cert. denied, 534 U.S. 1065 (2001) (No. 01-372).[2] Further review is not warranted in this case either.

1. Petitioner's central contention (Pet. 6) is that the court of appeals has "strayed from the plain language of the statute" in determining an employee's eligibility for LEO status. In particular, petitioner objects (Pet. 9) to the court of appeals' consideration of the factors developed by the Federal Circuit and the MSPB to assist in determining whether the statutory definition of LEO is met. That contention is without merit.

The purpose of the factors in adjudicating claims to LEO status is to assist the finder of fact in determining when the statutory definition is met, not to displace that definition. The factors articulated in *Bingaman*, which were first identified by the MSPB, were "extrapolated from the statutory and regulatory language, in light of the legislative history" and "capture[] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; see *Hobbs* v. *OPM*, 58 M.S.P.R. 628, 632 (1993) (discussing legislative history). As the court of appeals has explained, the *Bingaman* factors "were not set forth as a substitute for the statute, but rather as a framework for the factual inquiry needed to ascertain coverage under the statutory scheme." *Hall*, 264 F.3d at 1056; Pet. App. 13a. Similarly, in *Watson*, the court of appeals approved the position-oriented approach of the MSPB because it was "consistent with the statutory * * * criteria for LEO retirement credit" and the "legislative intent in providing for the LEO retirement program" and was adopted "[i]n order to be more faithful to the language of the statutes." 262 F.3d at 1297, 1299. As the Federal Cir-

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[2] See also *Watson* v. *Department of the Navy*, 262 F.3d 1292 (Fed. Cir. 2001), cert. denied, 534 U.S. 1083 (2002) (No. 01-725).

cuit explained in this case, the *Watson* approach "is more in keeping with the original language of the relevant statutes than an analysis of an employee's actual duties." Pet. App. 15a. Thus, while discussing and synthesizing the factors set forth in its precedent, the court below recognized that the statutory definition remains the touchstone for determining whether an employee qualifies for LEO status. See *id.* at 11a, 16a-19a, 23a.

The consideration of certain factors in deciding whether the statutory definition is met is especially appropriate when the court is faced with close and quintessentially fact-bound questions as to the nature of a particular position and the duties of individual employee-claimants occupying that position. DEA diversion investigators do not qualify as LEOs within the meaning of the statutory definition established by the CSRS. And the use of relevant factors as general guidelines for giving effect to the statutory definition helps to ensure that federal employees who Congress intended to be LEOs are granted such status and that others are not improperly awarded such status.

Petitioner suggests (Pet. 15) that the Federal Circuit's case law in this area is "muddled." That is incorrect. The Federal Circuit has carefully monitored and refined the criteria that it applies in determining whether the statutory definition has been met. There is no conflict in the circuits on this issue, nor even in the Federal Circuit's own decisions. And there is no need for this Court to undertake plenary review of this issue.

2. Petitioner claims (Pet. 11) that the legislative history of the civil service retirement statutes provides "no support" for the decision below. That is incorrect. The legislative history indicates that Congress intended LEO positions to be occupied by "young men and women

physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 948, 93d Cong., 2d Sess. 2 (1974)); Pet. App. 16a (same); see *Hobbs*, 58 M.S.P.R. at 632. At the same time, the interpretation urged by petitioner (Pet. 10)—that an employee may qualify as an LEO simply by demonstrating that he spends a majority of his time participating in criminal investigations, without regard to the nature of the activities performed in connection with those investigations—could extend LEO supplemental pay and retirement benefits to a broad class of employees such as chemists, laboratory technicians, paralegals and secretaries in prosecutors' offices, and others who do not perform strenuous, frontline law enforcement duties. There is no evidence—in the legislative history, much less the statute—that Congress intended to include such employees within the statutory definition of LEOs.

Petitioner claims (Pet. 10-11) that 5 U.S.C. 5545a(a)(2), which contains a statutory definition of the term "criminal investigator," is "the best place to look for clarification" of what constitutes LEO status. Not so. Section 5545a(a)(2) defines those LEOs who are also "criminal investigators." Because LEO status is a necessary predicate for a criminal investigator under Section 5545a(a)(2), the definition of "criminal investigator" does not address the requirements for LEO status. Rather, it addresses the specific requirements, *in addition* to LEO status, necessary to meet the statutory definition of "criminal investigator."

Petitioner suggests (Pet. 8) that the court of appeals erred in concluding that the degree of hazard faced by petitioner is a proper factor to consider in determining

whether he met the statutory definition. First, the court of appeals determined that petitioner was not an LEO without regard to the degree of hazard he faced. Pet. App. 22a. Second, the court of appeals, and the MSPB, have recognized on numerous occasions that "hazard is a significant element of law enforcement work." *Hannon*, 234 F.3d at 679 (citing MSPB cases); see *Watson*, 262 F.3d at 1303; *Hall*, 264 F.3d at 1058. In *Hannon*, the Federal Circuit completely reviewed the legislative history of the retirement statutes and concluded that "[n]othing in this history shows, or even suggests, that Congress intended to prohibit consideration of hazard in determining law enforcement officer status." 234 F.3d at 680.[3]

Petitioner also asserts (Pet. 12-13) that the court of appeals "erred in refusing to defer" to OPM's regulations implementing the statutes at issue. That is incorrect. Nothing in the court of appeals' decision in this case is inconsistent with the regulations implementing the civil service retirement statutes. Moreover, in a regulation implementing 5 U.S.C. 8401(17), the retirement statute under the Federal Employees Retirement System (FERS), which is parallel to 5 U.S.C. 8331(20), OPM

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[3] Petitioner relies (Pet. 8, 11-12 & n.32) on *Obremski* v. *OPM*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983), in challenging the Federal Circuit's consideration of the hazard posed by a position. The footnote cited by petitioner relies upon a portion of a floor speech made by Congressman Daniels, who stated that enhanced retirement benefits included in the 1974 Amendments were not a "reward" for performing hazardous duties. 119 Cong. Rec. 30,596 (1973). Daniels' statement emphasizes that the *reason* for providing early retirement to LEOs was not to reward them for hazardous duty, but rather to encourage early retirement because it typically becomes more difficult to perform hazardous duties as one ages. Daniels began that portion of his speech by stating that "the element of hazard was, and is, recognized." *Ibid.*

provided that, to meet the FERS's definition of an LEO, an employee's duties must be "so rigorous" that they should "be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

3. Petitioner's disagreement (Pet. 13-16) with the Federal Circuit's decision in *Watson*, is misplaced and in any event provides no reason to review the decision below. The Federal Circuit here approved of the *Watson* position-oriented approach, also used by the court in *Koenig*, because it agreed with the MSPB that the approach is more in keeping with the original language of the relevant statutes than an analysis of an employee's actual duties. Pet. App. 15a (citing *Watson* v. *Department of the Navy*, 86 M.S.P.R. 318, 320-321 (2000)).

Petitioner claims (Pet. 7) that, in *Watson*, the Federal Circuit "recognized the infirmity of [the] *Bingaman/Hannon* approach." To the contrary, the *Watson* Court recognized that the MSPB's position-oriented approach is "wholly consistent with the approach taken by this court in *Bingaman*," and that those factors may still be considered. 262 F.3d at 1301; see Pet. App. 15a-16a. Moreover, as was the case in *Watson*, 86 M.S.P.R. at 321, the court of appeals here emphasized that "notwithstanding the absence of a described LEO position," the employee may nevertheless attempt to demonstrate that there is a "conflict between the description of the position and the real-life facts of occupying the position." Pet. App. 20a.

4. Petitioner also claims (Pet. 16-17) that the court of appeals applied the wrong standard of review. That is incorrect and in any event presents no question warranting this Court's review. As the court of appeals correctly stated, "[l]egal analysis involving the application of law to the facts is a legal question that is reviewed de

novo." Pet. App. 8a (citing *Litton Indus. Prods., Inc.* v. *Solid State Sys. Corp.*, 755 F.2d 158, 164 (Fed. Cir. 1985)); *ibid.* ("We review the Court of Federal Claims' conclusions of law de novo and all of its findings of fact for clear error."). Applying this standard, the court of appeals concluded that the trial court failed to properly apply the law to the facts. See, *e.g.*, *id.* at 21a (concluding that the trial court "failed to find that [petitioner's] *position* had any strenuous physical fitness requirement" and improperly relied upon incidental physical labor as satisfying the physical fitness requirement).

In this case, the Federal Circuit determined that, based on its review of all the evidence, petitioner had not established that his position met the statutory definition of an LEO. Among other things, the court explained that "nothing in [petitioner's] position description or in any of the official documentation regarding his position articulated a physical fitness requirement," Pet. App. 21a; "[petitioner's] position did not authorize him to carry a firearm," *id.* at 22a; "there is no evidence that [petitioner's] position existed for the purpose of pursuing and detaining criminals," *ibid.*; "nothing in [petitioner's] position description mentions any requirements for contact with or interrogation of criminal suspects," *ibid.*; and, because "it has not been established by a preponderance of the evidence that fifty percent or more of [petitioner's] actual duties were LEO duties," *id.* at 23a, petitioner "cannot show that his actual duties conflict with his job description to the extent required to gain LEO status." *Ibid.* That highly factbound determination is correct and does not warrant further review in this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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